Supreme Court, U.S.
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No. 02-

IN THE
Supreme Court of the United States

LARRY S. BROWN,
Petitioner,

v.

JACKIE ASENCIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state courts should allow expert testimony on the twenty factors and other revenue rulings set forth in IRS regulations that are used to determine whether a worker is an employee or an independent contractor.

2. Whether federal common law of agency or state common law should determine the status of an employee in a breach of contact case where the determination affects federal income tax withholding and the payments of Social Security and other benefits.

3. Whether the trial court offended notions of justice and failed to adjudicate all of petitioner's claims by dismissing his case based inadmissible evidence, refusing to rule on a theory of recovery and allowing a verdict to stand where no evidence supported it.

LIST OF PARTIES

Petitioners hereby identify the following parties to this action pursuant to Rule 14.1(b):

Larry S. Brown who is the petitioner in this petition;

Jackie Asencio who is a respondent to this petition;

C2 Portfolio, Inc which is a respondent to this petition;

C2 Portfolio Essentials, Inc. which is a respondent to this petition; and

C2 Portfolio Platinum, Inc. which is a respondent to this petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 petitioner states that he is an individual. Petitioner owns Dream Homes, a corporation which is a privately held. Respondents are Jackie Asencio, an individual and C2 Portfolio, Inc., C2 Portfolio Essentials, Inc. and C2 Portfolio Platinum, Inc. The respondent companies are privately held corporations owned solely by Ms. Asencio. None of the corporations involved with this proceeding have affiliated parent corporations and none are publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

On November 30, 2001 the trial court excluded the testimony of petitioners' expert as to whether petitioner was an employee or an independent contractor according to IRS regulations. (Appendix ("Pet. App.") 7a-8a). On December 5, 2001 the Virginia Circuit Court for the City of Alexandria (per Kloch, John, E.) granted respondent's motion to strike petitioner's evidence, denied petitioner's motion to strike respondent's evidence and entered judgment in favor of respondent. (Appendix ("Pet. App.") 4a-5a). On January 17, 2002 the trial court denied petitioner's motion for reconsideration, to vacate of the jury verdict and for a new trial. (Pet. App. 2a-3a). On July 24, 2002 the Supreme Court of Virginia (per the court) refused petitioner's petition for appeal. (Pet. App. 1a). On September 13, 2002 the Supreme Court of Virginia denied petitioner's petition for rehearing. (Pet. App. 6a). All opinions are unreported.

STATEMENT OF JURISDICTION

Jurisdiction in the Virginia Circuit Court was based on the amount in controversy and the residence of the petitioner. The Supreme Court of Virginia entered its order denying petitioner's petition for rehearing on September 13, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions dispositive in this case.

STATEMENT OF THE CASE

This case is on appeal following a jury trial conducted in the Circuit Court for the City of Alexandria. The case involved

claims brought by Mr. Larry S. Brown ("Petitioner") against his former employers Jackie Asencio, C2 Portfolio, Inc., C2 Portfolio Essentials, Inc., C2 Portfolio Platinum and Jackie Asencio (collectively "Respondent").[1] The claims included breach of an employment contract and wrongful termination.

Petitioner alleged that he was improperly terminated and was stripped of his equity position in respondent after he brought compliance, licensing and tax related discrepancies to the attention of respondent. Following the presentation of petitioner's case the trial court struck petitioner's claims finding that material elements of a contract had not been established. The court ruled that petitioner had not established whether petitioner or his company Dream Homes was a party to the contract or whether petitioner was an employee or an independent contractor.

Respondent also brought a breach of contract counter claim against petitioner. Respondent alleged that petitioner breached a nondisclosure agreement by disclosing confidential information to one of its clients following his termination. The jury ruled in favor of respondents on the breach of contract claim.

First and foremost the trial court improperly gutted the testimony of petitioner's expert. The court refused to allow petitioner's expert to value C2 Portfolio, Inc. which was essential to his claim for equity. The court also prohibited him from testifying as to lost income. The court ruled that the jury would ultimately decide these issues and that expert testimony was not needed to aid the trier of fact. More significantly, the court refused to allow the expert to address and apply the

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[1] When the instant suit was brought petitioner also named C2 Portfolio Essentials, Inc. and C2 Portfolio Platinum, Inc. as defendants. However, immediately after the termination of petitioner by respondents both companies were dissolved and were consolidated with C2 Portfolio, Inc.

twenty factors adopted by the IRS to determine whether a worker is an employee or an independent contractor. This determination was central to petitioner's breach of an employment contract claim. And it was this very determination that the court ruled petitioner had not established.

It is necessary for state and federal courts across the country to have uniform and consistent guideposts to determine whether a worker is an employee or an independent contractor. The determination of this issue has widespread implications on federal and state tax filings and payments, contributions to worker's compensation and social security funds and the treatment of workers in the workplace. For example an employee only pays half of his or her social security payment with the employer paying the other half. However, an independent contractor pays the full 15.3% as a self-employment tax. The determination also affects sick and vacation leave, health insurance benefits, federal income tax withholding and workers compensation.

Considering the inevitable disputes that arise during the course of employment over the payment of these benefits it is imperative that state courts, federal courts and the IRS use the same standard for resolving this issue. At present, the ruling of the Virginia Supreme Court in this matter conflicts with the rulings of the ninth and tenth circuits as well as with this Court. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S.318 (1992); *Vendor Surveillance Corporation v. United States*,116 F.3d 488 (9th Cir. 1997); *Eastern Investment Corp. and Lowen Corporation v. United States of America*, 1995 U.S. App. LEXIS 3948 (10th Cir. 1995). These opinions accept the use of the twenty factors in jury and bench trials. This court must intervene to set a standard on this issue that has dramatic implications on our economy.

Consistent with the one sided ruling that excluded almost all of petitioner's expert testimony, the court made numerous discovery and evidentiary rulings that severely prejudiced petitioner's right to have his claims adjudicated. For example, the court allowed the admission at trial of evidence relating to respondent's damage request that were produced two days before trial. Additionally, the court did not dispose of a theory of recovery either by dismissing it or sending it to the jury.

The court fared no better in rendering evidentiary decisions at trial. The court allowed the introduction of a highly prejudicial statements included in a settlement demand letter drafted by petitioner. The court also allowed petitioner to testify on cross as to his understanding of the legal term "at-will" even though he was confused by the term. Even more outrageous was the admission by the court of classic hearsay testimony. Most of these evidentiary rulings were relevant to the key elements of the employment contract that the trial court found had not been established. Others cast a cloud over respondent's breach of contract claim and the jury verdict which petitioner sought to vacate. To add insult to injury the trial court then refused to give petitioner a new trial even after respondent admitted during its' case in chief that it refused to pay petitioner monies due him upon his termination.

i. Rule 14.1(g)(i) Compliance Statement

Pursuant to Rule 14.1(g)(i) petitioner states that on November 30, 2001 a pretrial conference occurred. At that time the federal question involved was raised. Respondent moved in limine for the exclusion of testimony of petitioner's expert regarding whether petitioner was an employee or independent contractor. Petitioner responded to the motion by arguing that there were twenty (20) factors considered by IRS agents in determining this very issue and that petitioner's expert would apply that law to the circumstance of this case. The court ruled at that time that the twenty IRS factors could

not be presented to the jury and that Virginia common law singularly controlled the issue. (Pet. App. 7a -8a). [2]

On December 3, 2001 at the commencement of trial the trial court denied petitioner's motion for reconsideration of this ruling. Following voir dire on the issue the court again ruled that the IRS factors could not be discussed or applied to the facts and circumstances of the case. The matter was further raised in the Supreme Court of Virginia. Petitioner presented the argument in his petitioner for appeal arguing that Mr. O'Neil should be allowed to address law set forth in IRS Revenue Rulings. The Supreme Court of Virginia denied petitioner's petition to hear the appeal and rule on this issue

ii. Dispositive Facts of Case

Larry S. Brown ("Petitioner") is a licensed CPA. In 1996 he formed Dream Homes, Inc. which provides general accounting and other services. C2 Portfolio, Inc. (collectively with Jackie Asencio "Respondent") is a Professional Employer Organization which contracts with employees and then leases them to businesses. PEOs pay the employees' salary, taxes and other benefits. As such PEOs must comply with numerous state and federal licensing, operating and tax regulations. In its invoices, respondent hides the fees that it charged clients for its services by "bundling" the fees with the payroll burden. They learned of this practice at an industry conference.

Petitioner first began working for respondent as a temp. Then in September of 1998 respondent agreed to pay petitioner $125 per hour as a consultant ("consulting contract"). During this time Brown continued working for other clients through Dream Homes. In January of 1999 respondent approached petitioner about working for respondent full time. At the time,

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[2] The hearing was not recorded by a court reporter and, therefore, the precise ruling pertaining to the twenty IRS factors is not available. However, the order giving the ruling as it pertains to the motion in limine is attached.

respondents' records were in disarray and the bank records had not been reconciled.

Following negotiations that extended over two months the parties agreed on the following employment terms: 1) Petitioner would work full time for one year with salary step increases to take place over one year; 2) After the initial one year employment term the parties would review the relationship; 3) Respondent would issue petitioner a 2 ½ percent equity interest on his first day and an additional 2 ½ percent equity interest after three months; and 4) Petitioner would receive benefits including vacation and sick leave ("Employment Contract"). Petitioner agreed to provide additional consideration by agreeing to sign a non-disclosure and non-compete agreement ("NDA".) Petitioner also agreed to work exclusively for respondent, wind down Dream Homes and forfeit his $125 per hour consulting agreement.

As evidence that Petitioner and not his company Dream Homes entered into the contract, petitioner signed the NDA personally and not as an officer of Dream Home. The agreement characterized him as a full time "employee". Also, petitioner also memorialized the terms of the employment contract in a memo which respondent said she would sign after her attorney reviewed it. The memorandum identified the parties to the contract as "Larry S. Brown, CPA", individually, and "Jackie Asencio, President of C2 Portfolio, Inc."

The facts presented at trial further established that Petitioner was as employee of respondent and not an independent contractor. Petitioner read respondents's personnel manual which he believed applied to him. Under the contract petitioner was paid a set salary on a bi-monthly basis and worked a forty-hour week. He drew up extensive "to do lists" and gave oral and written reports. Respondent also gave petitioner "to do" lists and reviewed his lists. Lastly, petitioner

was asked to fill out vacation requests forms, was given paid sick and vacation days and attended company meetings.

While working for respondent petitioner identified the following compliance problems: 1) Respondent used "marginal gray areas" of the tax code; 2) Respondent could not include a prior item on financial papers; 3) There was no lawful need to have three separate companies that did the same thing because any benefit respondent received regarding the maintenance of its workers compensation policies might not be proper; and 4) Some of the companies used by respondents to conduct business were not licensed in various states in which they did business. When petitioner brought discrepancies and oversights to Asencio's attention she retaliated by locking him out of the file cabinets, telling co-workers he could not be trusted and by berating him publicly.

After a disagreement over one of the compliance problems respondent presented petitioner with a document prepared by respondent's attorney entitled "Consulting Contract". Respondent told him to sign it or he would be fired. Petitioner refused to sign it because it departed from the employment contract they had previously agreed to in three significant ways. Respondent thereafter immediately terminated petitioner. Respondent deducted from petitioner's final check the $200 salary step increase he had just received, a bi-monthly salary payment and an approved vacation day.

Respondent refused to compensate or respond to petitioner's calls requesting his paycheck. Petitioner then left a message on the answering machine of one of respondent's clients. An employee for the client characterized the message at trial as follows:

> "[H]e had information about C2 Portoflio that would – basically on how the taxes were being paid and that we were overcharged on our fees and that I might want to get a little bit more information about that."

The employee who retrieved the message did not return the call and never spoke with petitioner. After the message was left the contract between the client and respondent remained intake and even expanded. Respondent claimed that this message caused it to sustain direct damages because respondent had to "absorb" a medical insurance rate increase that would have been paid by the client.

REASONS FOR GRANTING THE WRIT

The court ruled that evidence was insufficient to establish "material elements" of the contract. Those elements included an identification of the parties and whether the relationship was that of an employer/employee or an independent contractor. The lower court ruled that petitioner made "contrary" statements on these issues. First, it is debatable whether these two terms of the contract were "essential" necessary to form a contract where many other "essential terms" were agreed to.[3] The parties agreed to the truly essential terms including compensation, start date, work hours, and job responsibilities. Moreover, the "contrary" statements made by petitioner should have been strickened from the record based on fundamental evidentiary principles.

Since the court found that a written contract did not exist it held that the employment was presumably at will. This was contrary to the evidence. The court also ignored petitioner's alternate theory of recover – namely, that even if the contract term was not established then the relationship reverted back the parties original consulting contract. Under that agreement

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[3] A contract must only include essential terms expressed in a clear and definite way. Va. Model Jury Instruc. No. 45.170. It does not have to address all potential terms. *Belmont v. McAllister*, 116 Va. 285, 81 S.E. 81 (1914).

petitioner was to be compensated for $125 per hour.[4] In other words if petitioner did not receive his stock equity, step increases and one year of guaranteed employment that he bargained for then that arrangement was void and the preexisting relationship controlled. By outright ignoring as opposed to dismissing a legally supportable theory the lower court denied petitioner's right to an adjudication of his claims.

Regarding the dismissal of petitioner's wrongful termination claim, the lower court ruled that petitioner's complaint about the lack of licensing was not a violation of public policy sufficient to qualify as an exception to the at will doctrine. The court simply ignored the three other compliance infractions of which petitioner complained. It made these rulings in sustaining respondent's motion to strike where evidence is viewed in the light most favorable to petitioner just as in a summary judgment proceeding.[5]

I. THE LOWER COURT REFUSED TO ALLOW PETITIONER'S EXPERT TO APPLY AND DISCUSS AN IRS REVENUE RULING TO DETERMINE WHETHER PETITIONER WAS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

Central to petitioner's case was whether petitioner was an employee or an independent contractor. During the course of the litigation petitioner produced an expert report on this issue

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[4] The court held that petitioner had not made a request for compensation under a theory of quantum meruit. However, petitioner did not make such a request because he relied on a value for his services of $125 per hour that the parties had agreed to pursuant to the consulting contract.

[5] If there is no issue of genuine material fact then the case should be struck. *Costner v. Lachey*, 223 Va. 377, 290 S.E.2d 818 (1982). Reasonable doubt as to the sufficiency of the evidence must be resolved in favor of the nonmovant. Id.

that referenced several Revenue Rulings issued by the IRS on this issue. However at the pretrial conference respondents moved to exclude the testimony of Mr. O'Neil on these regulations. The court ruled that Mr. O'Neil could not discuss or apply in any way the Revenue Rulings but rather could only address the seven considerations set forth in state common law. (Pet. App. 7a-8a). These Revenue Rulings specifically developed twenty factors considered by the IRS to determine whether a worker was an employee or an independent contractor. Rev. Rul. 87-41, 1987-1 C.B. 296, 298-99.[6] The factors revolve around whether the employer has sufficient "control" over the work that is performed and over the manner in which the work is performed to indicate an employer/employee relationship. The greater the control the more likely that the relationship is one of employer-employee. The twenty non-exclusive factors incorporated elements of state common law as well as federal law and date back to their adoption in the Social Security Act of 1935.[7]

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[6] The factors were as follows: (1) Whether instructions are given as to how work is done; (2) Whether training is required; (3) Whether the services are integrated into business operations; (4) Whether services are rendered personally; (5) Whether the employer hires assistants; (6) Whether the relationship is continuing; (7) Who sets work hours; (8) Whether full time is required; (9)Whether services are performed on employer's premises; (10) Who prioritizes the work; (11) Whether reports are given: (12) Whether payment is by hour, week or month; (13)Who pays business or travel expenses; (14) Who furnishes tools and materials; (15) Whether the worker invests in facilities; (16) Whether worker can realize profit or loss; (17) Whether the worker works for multiple clients; (18) Whether worker makes services available to general public; (19) Whether the worker can be discharged; (20) Whether the worker can terminate his relationship. "The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed." Rev. Rul. 87-41.

[7] The federal law considered in developing these regulations include the Revenue Act of 1978, 1978-3 (Vol. 1) C.B. 119; the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. 698; and The Employment Tax Regulations; sections 31.3121(d)-1(c); 31.3306(i)-1.

This ruling on respondents' motion in limine had a devastating impact on the outcome of petitioner's case. The case was taken out of the hands of the jury because the trial court found that petitioner had not established who the parties to the contract were and what their relationship was. Both of these "essential elements" actually relate to one issue: whether petitioner was an employee or an independent contractor. If Dream Homes was a party to the contract then petitioner was an independent contractor. Therefore, Mr. O'Neil's testimony on this subject was pivotal. Without the backing of the authority on which he relied in rendering an opinion, petitioner's presentation on this issue was hamstrung and deflated.

The court also relied on other testimony in ruling there was no contract; (1) Petitioner's testimony that Virginia was an at-will state, (2) A letter from petitioner arguing that, alternatively, he was an independent contractor, and (3) That he would initially be an independent contractor. The court characterized these statements as "contrary" to his assertion that he was an employee. However, Mr. O'Neil could have dealt brought these statements into alignment through his reference to the IRS Revenue Rulings.

For example, in his expert report filed with the court months before trial, Mr. O'Neil set forth the following expert opinion: "'Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial." Rev. Rul. 87-41. Admission of this testimony would have undercut the rationale for the court's dismissal of petitioner's claims – i.e. that petitioner made contrary assertions. If Mr. O'Neil had been allowed to set forth the reasons why the parties' designation of their status is immaterial the court would not have been able to rely on petitioner "contrary" assertions in dismissing the case. The Revenue Rulings put these discrepancies into context.

rely on petitioner "contrary" assertions in dismissing the case. The Revenue Rulings put these discrepancies into context.

Considering the considerable liability for social security, workers compensation and federal tax withholding employees and employers frequently get into disputes over the status of the worker. To limit the administrative resources necessary to make thousands of such determinations every year, in 1987 the IRS developed the twenty factors. It then published the Revenue Ruling to publicly notify employers and workers of its position on this important public issue.[8] It is important to note that these Revenue Rulings are regulatory by nature and, as such do not embody or codify existing law. They rather merely apply the law to facts and circumstances. This is why they are referred to as a "guide" and not as formal requirements. Rev. Rul. 87-41. This is significance because if the twenty factors developed by the IRS constituted law then the lower court would have justifiably excluded testimony pertaining to it.

If all states do not follow the IRS regulations then the application of state common law will yield different results in different jurisdictions. This then affects the manner in federal taxes are withheld and social security and unemployment taxes are paid. These and other liabilities are mandated by federal law. *United States v. Renwald,* 1998 U.S. Dist. LEXIS 18707 (N.D. Ind. 1998). Such results may also differ with determinations made by the IRS. The conflict between federal administrative rulings and state common law arises because the IRS is authorized to and has adopted a procedure to determine

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[8] If an issue is of widespread significance then the IRS publishes a revenue ruling to set forth its position on the resolution of the issue. If the issue does not have such national ramifications then a private letter is issued. The issue as to whether a worker was an employee or a independent contractor was of such significance that the IRS memorialized its position in 1987 in a Revenue Ruling expecting courts, business and other agencies to follow it.

the status of a worker is an employee pursuant to a Form SS-8, otherwise known as a "request for ruling".[9]

In the "General Instructions" for filling out the form, the IRS states, "Firms and workers file Form SS-8 to request a determination of the status of a worker for purposes of Federal employment taxes and income taxes withholding." If the taxpayer sues his employer for benefits or breach of contract an ancillary state court proceeding might later then determine the same issue. *See In re Rasbury*, 1991 Bankr. LEXIS 1264 (Bankr. N.D. Ala 1991).[10] If the results differ then a taxpayer could incorrectly file tax returns and fail to make the appropriate deductions based on the state court or bankruptcy proceeding. This is why there must be consistency in applying twenty factors developed by the IRS in both federal and state courts and regulatory bodies.

For example, the ninth and tenth circuits have upheld the application of the twenty factors by courts and the jury to determine the status of workers. *Vendor Surveillance Corporation v. United States*, 116 F. 3d. 488, 1997 U.S. App. LEXIS 13971(9th Cir. 1997); *Eastern Investment Corp. and*

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[9] The determinations are bindings on the IRS, the worker and the firm and are based on the "entire relationship between the firm and the worker. The Form SS-8 contains fifty-six questions in order to determine the status of an employee. Headings under which the questions fall include (i) Behavior control; (ii) Financial control; (iii) Relationship of the worker and firm; and (iv) For service providers of salespersons.

[10] In *In re Rasbury* the bankrupt classified workers as independent contractors. An IRS agent reclassified them as employees applying the twenty factors and concluded that the employer should have been withholding federal income tax and FICA and FUTA employment taxes. The same issue then appeared in bankruptcy court. Noting that the application of the factors can be subjective the United States Bankruptcy Court for the Northern District of Alabama acknowledged the factors as the definitive federal authority on the issue. *See North Louisiana Rehabilitation Center, Inc. v. United States of America*, 179 F. Supp. 2nd 658(W.D. La. 2001)(applying the safe harbor exemption to the twenty factor test).

Lowen Corporation v. United States of America, 1995 U.S. App. LEXIS 3948 (10th Cir. 1995). In fact, a recent district court case found that factors adopted by the Supreme Court in *Nationwide Mutual Ins. Co. v. Darden* to define an employee were "closely related" to those in the Revenue Ruling.[11] This Court in *Nationwide* even cited the Revenue Ruling as a source for appropriate factors to be considered. Id. For this reason the decision of the Virginia Supreme Court in this case conflicts with the decision of the ninth and tenth circuits on an important federal matter. It also conflicts with a decision of this Court.

The reason this Court followed the twenty common law factors was explicitly set forth by this Court:

> "Since the common law test [of agency] contains no shorthand formula or magic phrase' that can be applied to find the answer, . . .all of the incidents of the relationship must be accessed and weighed with no one factor being decisive."

Nationwide, 503 U.S. at 324, citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

The Revenue Ruling contains twenty factors whereas Virginia common law considers only seven. The Revenue Ruling is also most closely aligned with restatement § 202 (2) which was applied in *Nationwide* and *Reid. supra.* The ruling of the lower court is, therefore, inconsistent with *Nationwide* and *NLRB.*

Nationwide also cited *Community for Creative Non-Violence v. Reid* in setting forth factors to be considered. 490 U.S. 730 (1989). *Reid* held that the term "employment"

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[11] *Albert Ware and Helen Ware v. United States*, 850 F. Supp. 602 (W.D.Mich. 1994), citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 117 L.Ed. 2d 581 (1992)(holding that the determination of whether a person is a employee or an "independent contractor should comport with traditional agency law principles).

incorporates "the general common law of agency rather than . . . the law of any particular state." This practice reflects the fact that Federal Statutes are intended to have uniform national application. *Id.* The lower court, however, imprudently subordinated general common law set forth in the Restatement § 202 (2) to Virginia Common Law. This approach must be corrected even in cases revolving around a breach of contract claim because the determination affects federal tax withholdings and the payment of Social Security and other benefits.

Petitioner suggests that the IRS indirectly sets national policy on whether workers are employees or independent contracts. Consistency throughout the nation on this important issue is vital for the filing of federal as well as state taxes returns. There must be one clear unequivocal voice on the subject and this Court must reinforce that voice.

II. THE TRIAL COURT DID NOT DISPOSE OF A LEGAL THEORY OF RECOVERY AND USED INADMISSIABLE EVIDENCE TO DISMISS PETITIONER'S CLAIMS

a) The Court Ignored Substantial Evidence In Finding That Petitioner Had Not Established A One Year Contract And That He Was An At-Will Employee

The issue as to whether the contract contained terms indicating an employment contract for one year clearly should have gone to a jury. This was a quintessential material fact in genuine dispute. Petitioner produced testimony that the parties agreed during prolonged oral negotiations to a one-year contract term. The parties agreed that the contract would be extended if after one year respondent could still afford petitioner. Additionally, the term was written down in

petitioner's memorandum which Asencio gave to her attorney.[12]

The lower court was adequately briefed on the following law but chose to completely ignore it:

> "In the absence of a signed written statement defining the term or length of an employment contract, the intended duration of an employment contract may be reasonably inferred from its terms based on written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment and the circumstances of the case." *Hoffman Specialty Co., v. Pelouze*, 158 Va. 586, 164 S.E. 397 (1932); *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987).

In other words the one year term does not need to be definitively set forth in writing. Additionally, circumstances of the parties relationship were largely ignored by the trial court.[13] The one-year relationship can reasonably be inferred

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[12] A memorandum can be considered in forming a contract. *In re Brookfield Centre Ltd. Partnership*, 135 Bankr. 23 (Bankr. E.D.Va. 1991). A contract may exist in written form, oral form or a combination of written and oral providing that it is definite, certain and unequivocal and where the acts relied upon to establish part performance is consistent with no other theory other than the existence of an oral contract. *See Beach v. Virginia Nat'l Bank*, 235 Va. 376, 367 S.E.2d 516 (1988).

[13] The law in Virginia regarding the formation of a contract is consistent with the law regarding establishing the term of the contract. It requires that terms are "reasonably certain and complete. *Renner Plbg., Heating & Air Conditioning, Inc. v. Renner*, 225 Va. 508, 303 S.E.2d 894 (1983). A term does not have to be definitively stated in written contract but may be determined in light of the facts and circumstances of each individual case. *Roto-Die Co., Inc. v. Lesser*, 899 F.Supp. 1515, 1519 (W.D.Va. 1995).

from these circumstances.[14] Moreover, the parties performed under the contract for three months with petitioner receiving his first salary step increase and paid vacation and sick days.

Other considerations ignored by the lower court include the extra consideration given up by petitioner in agreeing to work for respondent. He forfeited his consulting business and his $125 per hour consulting contract with respondent. He also restricted his freedom in signing the NDA. It only stands to reason that he would not have given up these rights and his consulting business without the promise of a one-year employment contract and an equity stake.

Evidently the Court relied on a statement by petitioner that his understanding was that Virginia was an "at-will" state and that that "superceded or took precedence over anything else." The court overruled counsel's objection that petitioner was clearly confused by a legal term and was not competent to testify on it. Moreover, petitioner clearly was testifying more about a legal concept rather than about the construction of the contract he entered into. He was clear that the parties were committed to a one-year term, however, he was unclear on how the law construed the contract. Perhaps that was because petitioner was a lay person on legal matters. In removing the case from jury deliberation based on this inadmissible testimony the court grossly abused its discretion.

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[14] Petitioner began working for respondent as a temp and then was hired as an independent contractor through the entity Dream Homes. The contract at issue arose because respondent required full time and exclusive help with their books. For this reason petitioner was hired under the condition that he wind down work for other clients. These were the circumstances that signaled a change in the employment status from an independent contractor to an employee.

b) There Was Sufficient Evidence From Which A Jury Could Determine The Identity And Relationship Of The Parties To the Contract

The trial court evidently was confused as to whether Dream Homes or petitioner was the contracting agent. This is an important issue because if Dreams Homes contracted with respondent petitioner was an independent contractor and could not maintain an action for wrongful termination. And if no employment contract for a definite term was established petitioner was an at will employee terminable for any reason or no reason. The record reveals that petitioner established these terms of the contract through evidence and expert testimony.

Regarding the identity of the parties, petitioner submitted abundant evidence that he personally was the contracting party:

- Petitioner personally performed all services for respondent and no one from Dream Homes did any work;
- He signed the NDA personally and not as an officer of Dream Homes. Ms. Asencio signed on behalf of C2 Portfolio, Inc.. At trial Ms. Asencio admitted that the NDA applied to petitioner personally;
- The NDA stipulated that the contract was between C2 and "Larry S. Brown";
- Petitioner was given and read the personnel manual; and
- The memorandum was on the letterhead of "Larry S. Brown, CPA" and was entitled "Employment Contract between C2 Portfolio and Larry Brown";

There is simply nothing contrary about these unequivocal facts. The very least that could be said is that the jury should

have resolved the issue. It also stands to reason that since petitioner agreed to work exclusively for respondent and wind down Dream Homes that Dream Homes could not perform services for respondent.

More importantly petitioner produced Mr. Dermot O'Neil as an expert witness. Mr. O'Neil found that many factors existed indicating that respondent exerted a degree of control over petitioner consistent with an employment relationship. [15] However, his testimony would have been stronger if he had been allowed to discuss the IRS Revenue Ruling that constitutes the highest authority on the issue. Respondent offered no witness or other evidence to rebut the testimony of Mr. O'Neil.

The court identified as a contrary statement petitioner's memorandum stating that he would initially be an independent contractor and would become an employee as soon as possible. The lower court also noted that petitioner assigned his paychecks for his work for respondents to Dream Homes. If his testimony was not so severely limited Mr. O'Neil would have testified that it does not matter where the money goes. The only controlling factor is which party personally performed the services. Mr. O'Neil also would have amplified his opinions expressed in his expert report that the parties' enunciation as to whether petitioner was an employee or independent contract is immaterial. This opinion again is based on the Revenue Rulings that the court excluded. Only the law establishes this legal relationship based on twenty factors. Notwithstanding

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[15] Those factors include the following: 1) Respondent reviewed and supplemented petitioner's "to-do" lists; 2) Time records, time cards, reports and vacation request forms were filled out, reviewed by respondent and filed; 3) Petitioner's work was kept in Company files; 4) Petitioner was integrated into the company, attended meetings and had to work at the facility; 5) Petitioner was required to personally perform all the services; and 6) Petitioner was to work exclusively for respondent and could not offer services to the public.

the court ruled that the nature of the parties' relationship was not established.

Another "contrary" statement relied upon by the court involved a statement petitioner made in a settlement written to respondent's attorney. The letter included a statement by petitioner that respondent, alternatively, owed him $125 per hour under the consulting contract. The court overruled counsel's objection to the introduction of the settlement letter and used the letter to rule that \petitioner had not established the nature of the relationship since the letter implied that he was an independent contractor. Actually, there was nothing contrary about the statement because this alternative theory of recovery was set forth in petitioner's complaint.

Even more perplexing was the trial courts' ruling that Mr. O'Neil could not testify as to petitioner's lost income resulting from respondent's actions. The court held that this was the ultimate issue for the jury and that expert testimony on such an issue was inappropriate. This was clearly wrong because under Virginia law an expert may testify to all matters that may aid the trier of fact even if the opinion involves the ultimate issue to be determined by the jury. This indicates just how one-sided the court was.

c) If A Contract For A Term Was Not Formed And An At Will Relationship Existed Petitioner Nonetheless Had A Viable Claim For Wrongful Termination

The court found that a complaint about the lack of licensing does not qualify as a violation of public policy sufficient to negate the at-will doctrine. The court simply was not following the trial. Petitioner made many complaints to respondent from the positions it took on tax matters and financial statements to the fact that it employed three corporate entities to skirt the law. Statutory violations constitute a

violation of public policy necessary to maintain an action for wrongful termination. Ms. Asencio who was the president of respondent and had no prior business experience watched her business grow but turned her eye away from the highly technical regulatory issues that surrounded her business of employing and leasing thousands of employees. And when petitioner brought compliance matters to her attention she retaliated in an effort to silence and control him, the very control she professed at trial to lack in their relationship.

The chronology is unmistakably revealing. Petitioner complained about the use of marginal gray areas of the tax code and Ms. Asencio berated him. He found $100,000 in bounced checks which went undetected for months and she erupted in a fury telling employees he no longer had access to the filing cabinets. And when petitioner suggested a paradigm shift that involved a different corporate structure Ms. Asencio capitulated on the salary step increase that was due. A few days later Ms. Asencio handed petitioner the proposed consulting contract with a "take it or leave it" ultimatum. Petitioner rejected it because it wiped out a salary step increase and the equity arrangement. In characteristic style Ms. Asencio retaliated by terminating him. It is revealing that C2 consolidated the companies into one entity immediately after respondent terminated petitioner. The dismissal of a case as strong as the one presented is astonishing.

When petitioner then moved for reconsideration of the decision granting respondent's motion to strike the court had the benefit of testimony of Ms. Asencio. Ms. Asencio was the president and sole director of C2 Portfolio, Inc. Under oath Ms. Asencio admitted that she improperly withheld the $200 step increase and other monies owed. This admission of a breach is enough to sustain Brown's breach of contract claim and take it to the jury. More importantly with this admission, respondent could not then turn around and sue on the NDA because they breached it first. *Sternheimer v.*

Sternheimer, 155 S.E.2d 41, 208 Va. 89 (1967). This was another reason for the court to order a new trial.[16]

III. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO STRIKE C2'S BREACH OF CONTRACT CLAIM AND REFUSING TO VACATE THE JURY VERDICT

In presenting his motion to strike, petitioner argued that he never shared confidential information with any respondent clients and that respondent sustained no damages. To support their claim for damages respondent presented only the testimony of one witness who heard a message left by petitioner. And the only testimony provided was as follows:

> "[Petitioner] had information about C2 Portoflio that would – basically on how the taxes were being paid and that we were overcharged on our fees and that I might want to get a little bit more information about that."

This "contact" concerned a message left by petitioner on an answering machine. At most it qualifies as an offer to share information because the tax issue was never qualified and petitioner never stated how the client was being overcharged. Moreover, Ms. Rendon did not take him up on his offer to call him back. Nothing came of it. Moreover, nothing in the message qualified as confidential information under the NDA.[17] It merely made respondent look bad and gave clients

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[16] A new trial should be granted if inferences necessarily underlying the verdict are not reasonably deducible from the evidence. *Sampson v. Sampson*, 221 Va 896, 275 S.E.2d 597, 601 (Va. 1981).

[17] At trial Ms. Asencio testified that the bundling scheme employed by respondent in billing clients was confidential. However, petitioner did not disclose this and, notwithstanding it was not confidential. All PEOs had access to it through industry wide seminars.

information which they already had on their bills There was only one other possible contact to which the judge and the jury could have relied to support the verdict. Ms. Asencio testified at trial that another client told her that Petitioner contacted him. However, Mr. Parker was not called to testify. The court overruled counsel's hearsay objection to this evidence. This was a clear abuse of discretion because it implied that petitioner and Mr. Parker had a conversation and that confidential information may have been shared. As such this evidentiary ruling impacted the denial of the motion to strike and the jury's decision.

Assuming the untenable, that respondent proved liability, the case also should have been stricken based on damages. Respondent offered no testimony or documents in support of their contention that petitioner's message caused them damages. The only evidence produced came two days before trial. During her deposition Ms. Asencio clearly stated that she knew of no damages at that time that resulted from petitioner's contacting a client. Also, no documents concerning damages were identified in response to discovery requests. And when the deadline for identifying trial documents and producing those not previously produced rolled around pursuant to the scheduling order respondent again failed to produce documents concerning damages. This clearly violated both discovery protocall and the scheduling order signed by the judge.[18]

It was only at the pretrial conference, three days before trial, that respondent noted the existence of such documents and identified the nature of the damages. By this time

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[18] The scheduling order stated, "Counsel of record shall exchange 15 days before trial a list specifically identifying each exhibit to be introduced at trial, copies of any exhibits not previously supplied in discovery, and a list of witnesses proposed to be introduced at trial." Opposing counsel neither identified or produced copies of the Exhibits S, T and U which were admitted into evidence and pertained to respondent's request for damages.

respondent was armed with new litigation counsel. Instead of producing them on the spot counsel argued the contents of a protective order for a day and then dropped off the documents at Kinkos two days before trial. Opposing counsel had to drive twenty miles on a Saturday to pick up the production and then poured over one hundred pages of documents two days before trial. The constituted more than unfair surprise. It was an flagrant abuse of discovery protocall sanctioned by the trial court. Once again petitioner twice moved the court for the exclusion of these documents that included damage calculation tables and summary documentation.

And even if the documents and evidence were properly admitted respondent sustained no direct damages from the message. As noted respondent continued to provide services to the client. Respondent claimed that it had to pay an annual insurance premium insurance increase on behalf of the client because of the message left by petitioner. Respondent alleged that this constituted direct damages because the other damages, time taken off work to deal with the litigation, were consequential in nature.[19] On cross-examination Ms. Asencio admitted that she had told the client a few months earlier that the increase would likely be only five percent and it turned out to be ten percent. Respondent clearly made a mistake which caused them to make a business decision and absorb the increase to keep the client. Such an admission blows wide holes in the verdict considering the standard for vacating the verdict. It also reveals the highly speculative and uncertain nature of the damages claimed.[20] *See Rice v. Community Health Ass'n*, 118 F.Supp. 2d 697 (S.D.W.Va. 2000).

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[19] Petitioner also had no notice of the claim for consequential damage until the testimony of Ms. Asencio at trial.

[20] Damages must be the natural and direct result of the breach and must be reasonably foreseeable when the parties entered the contract. *See* Virginia Code §8.2-708-718; *Long & Foster Real Estate, Inc. v. Clay*, 231 Va. 170, 343 S.E. 2d 297 (1986).

CONCLUSION

There are two reason why certiorari should be granted. The decision of the trial court to exclude all testimony regarding the application of twenty factors set forth in the Revenue Ruling conflicts with the decisions of this Court and the ninth and tenth circuits. Further, the issue involves the filing of federal tax returns, the withholding of federal monies from paychecks and payments on entitlement programs. It, therefore, centers around a federal issue of national importance. Certiorari should be granted to review this issue. Second, the lower court made multiple errors of law and abuses of discretion in this case that warrant the reversal of the trial court's rulings and the remanding of the case for a new trial. Its' ruling offended notions of justice and the rulings were all affected the limitations placed on the testimony of petitioner's expert. If this decision stands the Virginia Supreme Court and other jurisdictions will be allowed to apply state common law in a manner that conflicts with federal circuit cases on an issue of national importance.

Respectfully submitted,

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